TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. ~~235~~ 105.

ERNEST GATEWOOD, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED AUGUST 26, 1905.

(19,888.)

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SUPREME COURT OF THE UNITED STATES.

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vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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1 North Carolina Supreme Court.

STATE OF NORTH CAROLINA
vs.
ERNEST GATEWOOD.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the State of North Carolina, before you, or some of you, being the highest court of law or equity of said State, in which a decision could be had in said suit between the State of North Carolina and Ernest Gatewood, in which the said Ernest Gatewood was appellant, wherein was drawn in question the validity of a statute, or an authority exercised under, of said State on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege and exemptions specially set up or claimed under such clause of the said Constitution, all of which appears in the record and proceedings in said suit, manifest error has happened, to the great damage of the said Ernest Gatewood, as by his complant and contentions appears, we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things therein concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within thirty days from the date of this
2 writ in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct the error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 14th day of August in the year of our Lord 1905.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

H. L. GRANT,
Clerk of the Circuit Court of the United States
for the Eastern District of North Carolina,
By GEO. L. TONNOFFSKI, D. C.

Allowed.
WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

3 UNITED STATES OF AMERICA, *ss*:

To the State of North Carolina, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C. on the 2nd Monday, the 9th day of October, next, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of North Carolina, wherein The State of North Carolina is plaintiff and Ernest Gatewood is defendant in error, to show cause if any there be why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter Clark, chief justice of the supreme court of North Carolina, this the 14th day of August in the year of our Lord 1905.

WALTER CLARK,
Chief Justice.

Service of the above citation and receipt of a copy thereof admitted this the 15th day of August 1905.

A. L. BROOKS,
Attorney for State of North Carolina.

4 UNITED STATES OF AMERICA:

In the Supreme Court.

STATE OF NORTH CAROLINA
vs.
ERNEST GATEWOOD.

And now on this the 14th day of August, 1905, comes the defendant, Ernest Gatewood, plaintiff in error, by his attorneys Robert W. Winston and Victor S. Bryant, and say- that in the record and proceedings in the above entitled criminal cause, upon the special verdict found by the jury under the provisions of the Code of North Carolina, there is error in that:—

First. The said supreme court of North Carolina erred in deciding and holding in the opinion handed down and in the judgment rendered by said court in this cause, that there is "no error" in any of the several rulings, holdings and judgment of the superior court of Person county, North Carolina, upon the special verdict found by the jury and upon the judgment of the superior court of said Person county set forth in this cause thereby fully sustaining and affirming in each and every particular the said rulings, holdings and judgment of said superior court of Person county, and the plaintiff in error assigns the same as error contending now, as heretofore, that

the aforesaid rulings, holdings and judgment of the said superior court of said Person county should have been wholly reversed by said supreme court of North Carolina.

Second. And for a more particular and specific assignment of errors, the plaintiff in error says there was error in the following particulars, and in each of the following rulings and holdings of the court upon the said special verdict and judgment pronounced therein set forth in the record.

(1.) "Such condemned business has no connection with,
5 and the constitutionality of the prohibitive act is in no wise effected by the provision in section 7, that when any person, firm, or corporation engaged in manufacturing or wholesale merchandise shall purchase or sell the necessary commodities required in the ordinary course of their business, it shall not be deemed a violation of this act,—the act forbidding the business of carrying on a bucket shop."

(2.) "Though section 7, mentions only manufacturers and wholesale mercantile establishments as authorized to make *bona fide* dealings in futures, this was done unnecessarily we think, and only out of abundant caution; it is not a discrimination, for there is no prohibition upon anyone else, or any other business to buy commodities for future delivery *bona fide* in the ordinary course of such business when not for speculative or gambling purposes; that no other business or persons are mentioned as authorized to deal *bona fide* for the purchase of commodities on margin is not an implied restriction upon others to do an act not forbidden by any statute."

(3.) "Section 7 does not confer any exclusive right or privilege upon manufacturers or wholesale merchants, it does not authorize them to engage in any business prohibited by the act of 1889, it does not authorize them to speculate in cotton or other commodities; it simply provides that the courts shall not construe the act of 1905, to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business.

(4.) The defendant further contends that by section 5, c. 538 Laws 1905, proof that nothing was actually delivered at the date of the contract, and that a "margin" was put up, shall be *prima facie* evidence that the contract is a wagering one, and forbidden by chapter 221, p. 233, Laws 1889, and that section 7, c. 538, Laws 1905,
provided that this last act shall not apply to purchases or
6 sales by manufacturers or wholesale merchants of the necessary commodities required in the ordinary course of their business, is a discrimination forbidden by the fourteenth amendment. We do not think so, for the prescribing when and under what circumstances and as to what offenses a certain act shall be *prima facie* evidence is necessarily a matter left to legislative discretion in the exercise of the police power.

(5.) There may be good reasons why the purchase of necessary commodities required in the ordinary course of their business for

future delivery on a margin by manufacturers and wholesale merchants shall not raise a presumption that such dealings are wagering contracts, while purchases by them, not of such commodities, or when not required in the ordinary course of their business, or the purchase by others of any commodities, when made on the deposit of a margin and for future delivery, shall raise the presumption of a wagering contract. Whether the reason is good and sound for making the purchase of commodities upon margin *prima facie* evidence of a wagering contract under a certain state of facts, and providing that upon a different state of facts such purchase upon margin does not constitute *prima facie* evidence of a wagering contract, is a matter for the legislature. The courts have no veto power upon such exercise of the police power. State *v.* Barrett (at this term), (50 S. E. 506).

(6.) The facts found are that the defendant was carrying on the forbidden business. It can in *now* wise affect the validity of the statute making such business indictable that the purchase of commodities by others upon margin shall, under certain circumstances, raise a *prima facie* case that such purchases were void, and under other circumstances shall not constitute such *prima facie* evidence. A statute may be void in part and valid in part. If the provision as to *prima facie* evidence as to certain purchases upon margin, were null because not applying to all purchases upon margin, this would in no wise invalidate that part of the statute which forbids carrying on the business of running a bucket shop. The defendant is
7 not indicted for buying commodities for future delivery upon a margin; nor are manufacturers and wholesale merchants, nor anyone else, exempted from the prohibition of carrying on the bucket shop business. Upon the special verdict the defendant was properly adjudged guilty.

No error.

(7.) So far the provisions of both acts clearly fall within the police power of the State, and it is not denied that, if nothing further appeared in the statute, the defendant is guilty upon the facts found in the special verdict, which are that the defendant opened and established an office in Raleigh for the purpose of carrying on the business forbidden by the above-cited statu-es, Laws 1889, p. 233, c. 221, and Laws 1905, c. 538.

8 Third. And the judgment set forth in this record based upon and rendered by the court pursuant to the special verdict of the said superior court of Person county, which was upon exceptions thereto and by appeal therefrom sustained by said supreme court of North Carolina was also erroneous.

Fourth. The supreme court of North Carolina in the opinion handed down in this cause erred in deciding and holding that upon the special verdict the defendant was properly adjusted guilty, thereby in effect erroneously deciding and holding that chapter 538, Law of 1905, was not in conflict with section 1 of the 14th amendment of the Constitution of the United States, to wit; the section

which guarantees equal protection of the laws and due process of law to all persons.

Wherefore the said plaintiff in error prays that the judgment of the supreme court of North Carolina be reversed and that such orders and decrees be made and further proceedings had as the plaintiff in error may be entitled to.

Dated at Raleigh, N. C., Aug., 1905.

ROBERT W. WINSTON,
VICTOR J. BRYANT,
Attorneys for Ernest Gatewood, Plaintiff in Error.

9 Bond.

Know all men by these presents that we, Ernest Gatewood principal, and T. J. Lambe and C. L. Lindsay, as sureties, are held and firmly bound to the State of North Carolina in the full and just sum of five hundred dollars to be paid to the said State of North Carolina and its successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated the 14th. day of August in the year of our Lord 1905.

Whereas lately in the supreme court of North Carolina, in suit pending in said court between The State of North Carolina plaintiff and Ernest Gatewood defendant, judgment was rendered against the said Gatewood, and said Ernest Gatewood having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the State of North Carolina, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington on the 9th. day of October next: Now, the condition of the above obligation is such that if the said Ernest Gatewood shall prosecute the said writ of error to effect and answer all damages and costs if he fail to make his said plea good, then the said obligation to be void; otherwise to remain in full force and effect.

ERNEST GATEWOOD,
By ROB'T W. WINSTON AND
VICTOR S. BRYANT,
His Attorneys.
C. L. LINDSAY. [SEAL.]
T. J. LAMBE. [SEAL.]

STATE OF NORTH CAROLINA, }
County of Durham. }

C. L. Lindsay being duly sworn says he is a freeholder and resident of the county of Durham aforesaid, and that he is worth the sum of one thousand dollars over and above all his just debts and

liabilities, and in excess of his homestead and personal property exemptions allowed by law.

C. L. LINDSAY.

Subscribed and sworn to before me this 22 August, 1905.
[L. S.] W. J. CALLOWAY,
Notary Public.

STATE OF NORTH CAROLINA, }
County of Durham. }

T. J. Lambe, being duly sworn, says he is a freeholder and resident of the county of Durham aforesaid, and that he is worth the sum of one thousand dollars over and above all his just debts and liabilities, and in excess of his homestead and personal property exemptions allowed by law.

T. J. LAMBE.

Subscribed and sworn to before me this 22 August, 1905.
[L. S.] W. J. CALLOWAY,
Notary Public.

Approved:
WALTER CLARK,
Chief Justice of Supreme Court of N. C.

10 NORTH CAROLINA, }
Person County. }

Be it remembered that at a superior court of law held for the county of Person at the court-house in Roxboro on the fifth Monday after the first Monday in March in the year of our Lord one thousand nine hundred and five, before the Honorable R. B. Peebles, judge presiding, upon the oath of G. B. Williams, S. S. Moore, J. R. Long, G. W. Dunny, Walter Williams, G. W. Moore, C. B. Brooks, G. T. Pentecost, G. A. Daune, W. A. Barton, Zeb V. Barnett, J. W. Clayton, A. P. Brooks, Zadock Slaughter, M. .T Carver, J. T. Newton, C. G. Reade and R. C. Hester, good and lawful men of the county aforesaid, duly summoned, drawn, sworn and charged to inquire for the State, of and concerning all crimes and offenses committed within said county, and it is presented in manner and form following, that is to say:

Indictment.

NORTH CAROLINA, }
Person County. }

The jurors for the State upon their oaths present: That Ernest Gatewood, late of the county of Person, on the 1st day of April, 1905, with force and arms at and in the county aforesaid unlawfully and willfully did establish and open and keep then and there an

office and place of business for the purpose of carrying on and engaging in the business of entering into contracts to sell and deliver cotton and other products, also stocks, bonds and other evidences of debt to other persons or corporations for future delivery at some other time and place, and that he, the said Ernest Gatewood was then and there ready, willing and prepared, and did intend to unlawfully and willfully enter into such contracts with all persons and corporations to sell and deliver cotton and other products, and also stocks, bonds and other evidences of debt to other corporations for future delivery at some other time and place where it was not intended by the parties hereto that the articles so agreed to be sold and delivered should be actually delivered or the value thereof paid, but it was intended and understood by them that money or other things of value should be paid to one party by the other or to a third party, and that the amount of such money or other thing of value so to be paid, to depend upon whatever the market price or value of the article so agreed to be sold and delivered was greater or less at the time and place so specified than the price so stipulated to be paid and received for the article so to be sold and delivered, such contracts commonly called future contracts, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State.

And the jurors aforesaid upon their oaths aforesaid do further present that the said Ernest Gatewood, late of said county, on the 1st day of April, 1905, with force and arms and in the county aforesaid unlawfully and willfully did post and publish from information received over his wires the fluctuations in price of grain, cotton, provisions, stocks, bonds and other commodities contrary to the form of statute in such cases made and provided. And the jurors upon their oaths do further present that the said Ernest Gatewood, late of said county, on the 1st day of April, 1905, with force and arms at and in said county aforesaid unlawfully and willfully did take and receive from E. T. Lea an order or contract to purchase on margin 100 bales of cotton for future delivery, to-wit, August delivery at 7 56-100 — per pound and that said Lea did deposit with said defendant at said time in said county, the sum of $50.00 by way of
11 margin fluctuations in said cotton, and that settlement between said parties for said cotton was agreed to be made upon the difference in value of said cotton at said date and the date of its delivery, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State.

BROOKS, Solicitor.

Endorsements.

Endorsements on bill.
State against Ernest Gatewood.
Indictment.
Keeping office to sell margins.

Witness:
C. T. WILSON. X

Those marked X sworn and examined and this bill found true bill.

G. B. WILL-AMS,
Foreman Grand Jury.

Jury.

Whereupon the sheriff of said county is commanded that he cause the said Ernest Gatewood to come and answer at the said term of said court, and afterwards to-wit, at the term of said court held in Roxboro on the fifth Monday after the first Monday in March in the year of our Lord one thousand nine hundred and five, it being the 10th day of April, 1905, before the Honorable R. B. Peebles, judge presiding, cometh the said Ernest Gatewood in his own proper person, and having heard the said indictment read, he saith that he is not guilty thereof, and of this he puts himself upon the country, and A. L. Brooks, solicitor, who prosecutes for the State in this behalf, doth the like. Therefore, let a jury come of good and lawful men, by whom the truth of the matter may be known. And thereupon the following jurors, to-wit: S. Y. Wrenn, L. B. Clayton, R. A. Allen, J. H. Sherman, J. D. Ashley, Wesley Laus, Henry Mitchell, A. M. Denny, F. D. Daniel, G. C. Fousher, J. H. Pentacost, W. S. Dixon, being chosen, tried and sworn to speak the truth of and concerning the premises in the said indictment specified, upon their oath they say as follows:

Special Verdict.

In this case the jury come into open court and return the following special verdict, to-wit:

1. The defendant is operating in Roxboro, N. C., an office or place of business for the purpose of carrying on and engaging in the business of entering into contracts to sell and deliver cotton, corn, stocks, bonds and choses in action to other persons for future delivery at some other time and place, and is ready, prepared and intends to enter into contracts with any and all persons to sell and deliver cotton, corn, stocks and bonds and other choses in action for future delivery at some other time and place, and that it was not intended by the parties to said contracts that the said articles or things so agreed to be sold and delivered should be actually delivered or the value thereof paid, but it was intended and understood by them that money should be paid to the one party by the other, and that the amount of such money or thing of value so to be paid was to depend upon whether the market price or value of the article so agreed to be sold and delivered was greater or less at the time and place so specified than the price so stipulated to be paid and received for the articles so to be sold and delivered and that such a contract is what is called a future contract.

2. That on the 10th day of April, 1905, the defendant received

from E. T. Lea an order to purchase on margin 100 bales of cotton for future delivery, to-wit, for August delivery at 7 56-100 cents —. That said Lea deposited with the defendant at said time in said county the sum of $50.00 by way of margin to cover fluctuations in the price of said cotton. That settlement between said parties was agreed to be made upon the difference in value of said cotton at said date and the date of delivery.

12 3. That in said office at Roxboro the defendant has posted and published from information received on the 10th day of April over his wires the fluctuations in prices of grain, provisions, cotton, bonds and other commodities.

If upon the foregoing facts the court is of opinion that the defendant is guilty the jury so find. If the court is of opinion upon the facts so found that he is not guilty then the jury find him not guilty.

The court being of opinion upon the facts as found that the defendant is guilty orders a verdict of guilty to be entered and upon motion orders that the defendant pay a fine of five dollars and costs.

Exceptions and Judgment.

Thereupon the defendant moved for a new trial because the act of 1905, chapter —, is in conflict with XIV amendment, section 1, of the Constitution of the United States, to-wit: The guarantee of equal protection of the laws. Motion overruled, and it is thereupon considered by the court that the said Ernest Gatewood shall pay a fine of $5.00, and that he stand committed to the custody of the sheriff until the said fine and cost of this prosecution be paid.

From this judgment the said Ernest Gatewood prays an appeal to the supreme court, and it is allowed upon his giving bond in the sum of $50.00 with G. C. Farthing as surety. Appeal bond given and herewith sent.

Case on Appeal.

This was a criminal action tried before his honor, R. B. Peebles, judge, and a jury at the April term, 1905, of Person county superior court. Upon the hearing and evidence offered the jury returned a special verdict as set out in the record. Upon said verdict his honor was of the opinion that the defendant was guilty and the jury thereupon rendered a verdict of guilty. The defendant moved for a new trial for error as set out in the record, motion overruled and defendant excepted and appealed to the supreme court. Notice of appeal given in open court, notice waived. Judgment rendered as set out in the record.

GUTHRIE & GUTHRIE,
WINSTON & BRYANT,
Attorneys for Defendant.

Service is accepted of the foregoing case on appeal, and the same is accepted by the solicitor as the case on appeal for the supreme court.

A. L. BROOKS,
Solicitor Ninth Judical District.

Undertaking on Appeal.

NORTH CAROLINA,
Person County.

STATE
against
ERNEST GATEWOOD.

Whereas, Ernest Gatewood above named has appealed from the judgment of the superior court of Person county at this term entering fine of five dollars and costs against him for dealing in futures.

Now, therefore, Ernest Gatewood and G. C. Farthing undertake in the sum of fifty dollars, that we will pay all cost which may be awarded against him by the supreme court upon said appeal, and the said Ernest Gatewood and G. C. Farthing bind themselves, their heirs and executors to and with the State of North Carolina that they will pay whatever costs may be taxed against the defendant upon said appeal.

Witness their hands and seals this April 12, 1905.

ERNEST GATEWOOD. [SEAL.]
G. C. FARTHING. [SEAL.]

13 NORTH CAROLINA,
Person County.

G. C. Farthing, being duly sworn states that he is worth one hundred dollars over and above his debts, liabilities and exemptions. This April 12, 1905.

Sworn to and subscribed before me this April 13, 1905.

W. J. HOLLOWAY,
Notary Public.

Clerk's Certificate.

I, D. W. Bradsher, clerk of the superior court of law of the county of Person, do hereby certify that the foregoing contains a full, true and perfect transcript of the record of said Court in the case of the State against Ernest Gatewood.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at office in Roxboro, this the 11th day of April, 1905.

D. W. BRADSHER,
Clerk Superior Court.

[L. S.]

Docketed Apr. 13, 1905. Argued Apr. 26, by attorney general for State, Winston & Bryant and Guthrie & Guthrie for defendant. Opinion handed down on May 23, 1905, as follows:—

Per Curiam: Upon the authority of State *v.* McGinnis, at this term, there is no error.

14 (Title of Cause:)—Judgment.

This cause came on to be argued upon the transcript of the record from the superior court of Person county:—upon consideration whereof, this court is of opinion that there is no error in the record and proceedings of said superior court.

It is therefore considered and adjudged by the court here, that the opinion of the court be certified to the said superior court, to the intent that proceedings be had therein in said cause according to law.

And it is considered and adjudged further, that the defendant and surety do pay the costs of the appeal in this court incurred, to-wit, the sum of twenty-one 80/100 dollars ($21.80), and execution issue therefor.

15 The record and proceedings in State *v.* McGinnis, referred to in the above transcript of record are as follows:—

NORTH CAROLINA, }
Wake County. }

Superior Court, March Term, 1905, Before Walter H. Neal, Judge.

(Formal Opening of Court and Name of Grand Jury.)

Indictment.

The jurors for the State upon their oath present:

That E. C. McGinnis, late of the county of Wake, on the 22nd day of March, in the year of our Lord, one thousand nine hundred and five, with force and arms, at and in county aforesaid, unlawfully and wilfully, did establish, open and have, then and there, an office or place of business for the purpose of carrying on and engaging in the business of entering into contracts to sell and deliver cotton, Indian corn, wheat, rye, oats, tobacco, salt, pork, salt fish, meal, lard, bacon, beef cattle, sugar, coffee, stocks, bonds, and choses in action, to other persons or corporations, for future delivery, at some other time or place, and that he, the said E. C. McGinnis, then and there, was ready, willing, and prepared and intended to unlawfully and wilfully enter into such contracts with all persons and corporations to sell and deliver cotton, Indian corn, wheat, rye, oats, tobacco, salt, pork, salt fish, meal, lard, bacon, beef cattte, sugar, coffee, stocks, bonds, and choses in action, to other persons and corporations, for future delivery, at some other time and place, whereas

it was not intended by the parties thereto that the articles or things, so agreed to be sold and delivered should be actually delivered, or the value thereof paid, but it was intended and understood by them that money or other things of value should be paid to one party by the other, or to a third party, and that the amount of such money or other thing of value so to be paid to depend upon whether the market price or value of the article so agreed to be sold and delivered, was greater or less, at the time and place so specified, than the price stipulated to be paid and received for the articles so to be sold and delivered, said contracts being commonly called "futures," against the form of the statute in such case made and provide, and against the peace and dignity of the State.

ARMISTEAD JONES, Solicitor.

16 (Title of Cause.) [Endorsed.]

Witnesses: R. G. Reid, J. A. Pope.*

Those marked * sworn by the undersigned foreman, and examined before the grand jury and this bill found a true bill.

J. D. MARCOM,
Foreman Grand Jury.

Trial, Etc.

And thereupon at said March term, A. D. 1905, begun and held as aforesaid, at the court-house in Raleigh, on the third Monday after the first Monday in March, in the year of our Lord, one thousand nine hundred and five, before Honorable Walter H. Neal, judge, cometh the said E. C. McGinnis, in his proper person, and having heard the said indictment read, he saith that he is not guilty thereof, and of this he puts himself upon the country, and Armistead Jones, Esq., solicitor, who prosecutes for the State in this behalf, doth the like.

Therefore let a jury come of good and lawful men, by whom the truth of the matter may be better known.

And thereupon the following jurors, to-wit: A. J. Sorrell, P. A. Sorrell, J. M. Norwood, J. G. Upchurch, R. J. Barham, W. J. Mitchell, W. H. Wall, S. C. Seagroves, O. W. Lynn, W. J. Wilson, E. D. McNeal and J. D. Johnson, being chosen, tried and sworn to speak the truth of and concerning the premises in the said indictment specified upon their oath say:—

Special Verdict.

The jury find the following as a special verdict:

That E. C. McGinnis of Wake county, on the 22nd day of March, 1905, established, opened and had, in the city of Raleigh, N. C., an office or place of business for the purpose of carrying on and engaging in the business of entering into contracts to sell and deliver

cotton, Indian corn, wheat, rye, tobacco, salt, pork, salt fish, meal, lard, bacon, beef, cattle, sugar, coffee, stocks, bonds, and choses in action, to other persons or corporations for future delivery, at some other time and place, and that he, the said E. C. McGinnis, then and there, was ready, willing and prepared and intended to enter into said contracts with any persons and corporations to sell and deliver cotton, Indian corn, wheat, rye, tobacco, salt, pork, salt fish, meal, lard, bacon, beef, cattle, sugar, coffee, stocks, bonds and choses in action, to other persons and corporations for future delivery at some other time and place, whereas, it was not intended by the parties thereto that the articles or things so agreed to be sold and delivered should be actually delivered or the value thereof paid, but it was intended and understood by them that the money or other things of value should be paid to the one party by the other, or to a third party, and that the amount of such money or other things of value so to be paid to depend upon whether the price or value of the market price or value of the articles so agreed to be sold and delivered was greater or less, at the time and place so specified, than the price stipulated to be paid and received for the articles so to be sold and delivered. Said contracts being commonly called "futures."

If upon the foregoing facts the court shall be of opinion that the defendant is guilty, then the jury find him guilty. If upon the foregoing facts the court shall be of opinion that the defendant is not guilty, then the jury find him not guilty.

The court thereupon instructed the jury that upon the facts found, the defendant was guilty, and the jury returned a verdict of guilty.

17 Judgment.

And thereupon the judgment of the court being prayed by the solicitor for the State, it is considered and adjudged by the court that the said E. C. McGinnis, now here, shall pay a fine of five dollars and the costs herein to be taxed by the clerk of this court.

(Defendant appealed to supreme court, and filed bond on appeal.)

Admissions of the Defendant Before the Justice of the Peace Referred to and Ordered to Constitute a Part of the Case on Appeal to Supreme Court.

It is admitted by the defendant that he is an agent in Raleigh of Ware & Leland, who are members of the New York cotton exchange, and have an office in the city of New York; that the defendant as such agent now maintains an office heretofore established in the city of Raleigh, where are posted and published, from information received, fluctuating prices of cotton, grain, stocks, bonds and other commodities, as reported from time to time from said New York cotton exchange and other sources.

E. C. McGINNIS, Defendant.

Exceptions.

The defendant excepts to the judgment rendered in the above entitled case and assigns for error:

1. That the court held that the act of the General Assembly of North Carolina enacted at its session of 1905, entitled "An act to prevent dealing in futures," under which the defendant is indicted, was valid and constitutional and directed the jury to return a verdict of guilty upon the special verdict; whereas the court should have held that said act was invalid and unconstitutional, because it is in conflict with the provisions of the fourteenth amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, and should have directed a verdict of not guilty.

2. Because the said court held that said act was not in conflict with article 1, section 8, of the Constitution of the United States and was therefore valid and directed the jury to return a verdict of guilty upon the special verdict; whereas said court should have held that said act was in conflict with said section and was therefore invalid and should have directed a verdict of not guilty.

3. Because the said court held that said act was not in conflict with article 1, section 7, of the Constitution of North Carolina and was therefore valid, and directed the jury to return a verdict of guilty upon the special verdict; whereas said court should have held that said act was in conflict with said section 7 of article 1 of the constitution of North Carolina and was therefore invalid, and should have directed the jury to return a verdict of not guilty.

(Certificate and seal of the clerk superior court of Wake county.)

Docketed Apr. 7, 1905; argued Apr. 26; opinion handed down May 23 as follows:

18 CLARK, C. J.:

This is an indictment under chapter 538, Laws 1905, "to prevent dealing in futures."

By chapter 221, Laws 1889, "to suppress and prevent certain kinds of vicious contracts," it was in substance enacted as follows: Section one made void all contracts for the sale of articles therein named for future delivery, wherein (notwithstanding any terms used) it is not intended that the articles agreed to be sold and delivered shall be actually delivered, but only the difference between the contract price and the market value at the time stipulated shall be paid. Section two enacted that when the defense provided by that act is set up in a verified answer, the burden shall be upon the plaintiff to prove a lawful contract, but the answer shall not be used against the defendant on an indictment for the transaction. Section three

made the parties to such contract, and agents concerned therein, indictable, and section four made persons while in this State consenting to become parties to such contract, made in another State, and all agents in this State, aiding and furthering such contract, made in another State, indictable.

Chapter 538, Laws 1905, provides: Section 1. That it shall be unlawful to open or establish an office in this State for dealing in futures, as forbidden by aforesaid act. Section 2 makes such act a misdemeanor. Section 3 provides that no person participating in such act shall be excused from testifying, but a party so testifying is pardoned for such offense. Section 4 specifies certain acts which shall be *prima facie* evidence of a violation of this statute. Section 5 specifies what shall be *prima facie* evidence of a contract forbidden by the act of 1889, and section 6 provides what shall be *prima facie* proof of the opening and establishing an office in violation of this act and the act of 1889.

So far, the provisions of both acts clearly fall within the police power of the State, and it is not denied that if nothing further appeared in the statute, the defendant is guilty upon the facts found in the special verdict, which are that the defendant opened and established an office in Raleigh for the purpose of carrying on the business forbidden by the above cited statutes, Laws 1889, ch. 221, and Laws 1905, ch. 538.

The business forbidden by the act of 1905 is—to avoid a *paraphrasis*, and following the usual American method of describing an act by a word or a phrase—the business of running a "bucket shop," which is defined by the Century Dictionary as, "An establishment, nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of bets, or wagers, usually for small amounts, on the rise or fall of the prices of stocks, grain, oil, etc., there being no transfer or delivery of the stock or commodities nominally dealt in." In Board of Trade of Chicago *v.* Odell Commission Co., 115 Fed. Rep., 574, the president of the board of trade, in answer to a question, thus defined a "bucket shop:" "It is a place where dealings are had upon the fluctuations in the market price, without any *bona fide* transactions."

The definition of "bucket shop" in Webster's Dictionary is,
19 "An office or place where facilities are given for betting small sums on current prices of stocks, petroleum, etc."

In Smith *v.* Tel. Co., 84 Ky., 664, the court describes the manner of dealing at a "bucket shop" in full detail, and defines its business, "while purporting to be actual transactions" as being "*in fact merely wagers* on the market price of some commodity, at some specified time in the future," and in the absence there of any statute, held that such business was "a species of gambling as well defined and reprehensible as that of keeping a faro bank or a dice machine, and it is therefore illegal and contrary to public policy." A "bucket shop" is defined (Bryant *v.* Tel. Co., 17 Fed. Rep., 825, and Fortenbury *v.* State, 47 Ark., 192), as "a place where wagers are made

upon the fluctuations in the price of grain and other commodities," and in both cases the course of dealings at such establishment is fully described, as in Smith *v.* Tel. Co., *supra*, but in all these cases, of course, solely upon the information given the learned judges by the testimony of witnesses, set out in the record.

In Weare *v.* People, 209 Ill., 528, is a recent, full and able discussion of statutes against "bucket shops," sustaining Soby *v.* People, 134 Ill., 66. Indeed, the word "bucket-shop," as well as the business it transacts, is mentioned and denounced in many statutes and decisions, and both the name and the business have become matters of general knowledge. In Booth *v.* Illinois, 184 U. S., 425, it was held that the Illinois statute making all "dealings in futures" gambling contracts and punishable, was within the police power of the State and not prohibited by the fourteenth amendment—affirming *s. c.*, 186 Ill., 43.

In Irwin *v.* Williar, 110 U. S., 499, the court said: "If under guise of the contract to deliver goods at a future day the real intent be to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, the whole transaction is nothing more than a wager, and is null and void." Wagner *v.* Hildebrand, 187 Pa. St., 136; Jamieson *v.* Wallace, 167 Ill., 388; Wheeler *v.* Stock Exchange, 72 N. H., 315; Clews *v.* Jamieson, 182 U. S., 461; Pickering *v.* Cease, 79 Ill., 328: Bibb *v.* Allen, 149 U. S., 481; 1 Cook on Stock and Stockholders, 3rd ed., sec. 341.

Freund on Police Power (1904), p. 186, says: "It is well established that if there is no intention to buy or sell, but only to pay or receive differences in value, the transaction is simply betting on the rise or fall of market prices, and hence illegal and void."

While the facts found bring the defendant within the words of the statute, it is contended that the addition of the seventh and last section made the whole act unconstitutional and void under the fourteenth amendment to the Constitution of the United States, which guarantees the equal protection of the laws. Said section 7 reads: "This act shall not be construed so as to apply to any person, firm, corporation, or his or their agent, engaged in the business of manufacturing or wholesale merchandising in the purchase or sale of the necessary commodities required in the ordinary course of their business." This section is stated by counsel, and we believe was admitted on the argument, to have been added upon the passage of the bill in the second house. It was doubtless hastily drawn, for it is clearly not germane to the statute which is for the prohibition of the establishment or opening an office for the purpose of engaging in or carrying on the business of a "bucket shop," *i. e.*, dealing in the sale of futures, where "it is not intended by the parties thereto that the articles agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them" that merely the difference between the contract

price and the market price of the article at the time specified
20 shall be paid. Such condemned business has no connection with, and the constitutionality of the prohibitive act is in no wise affected by, the provision in section 7, that when any person, firm or corporation engaged in manufacturing or wholesale merchandise shall purchase or sell "the necessary commodities required in the ordinary course of their business," it shall not be deemed a violation "of this act"—the act forbidding the business of carrying on a "bucket shop."

The defendant, however, contends that the purpose of section 7 is to provide that where any manufactory or wholesale merchandising house shall contract to deliver goods at a future date, such establishment may protect itself or "hedge" (as it is called) by purchasing a "future" contract for raw commodities, without intending to demand actual delivery of those identical goods, but, by the profit thereby made, to recoup the loss by the rise in price of the same commodity subsequently bought, perhaps for actual delivery nearer home, to save freight. It is enough to say that no such intent is expressed in section 7, and we must construe it as it is written.

But a purchase for actual future delivery of necessary commodities required in the ordinary course of business and not for "wagering" or gambling on the fluctuations of the market, would not be against the statute. The statute of this State does not prohibit all purchases or sales for future delivery, but only such dealings as are in the nature of gambling or wagering contracts. Though section 7 mentions only manufacturers and wholesale merchantile establishments as authorized to make *bona fide* dealings in "futures," this was done unnecessarily, we think, and only out of abundant caution. It is not a discrimination, for there is no prohibition upon any one else or any other business to buy commodities for future delivery *bona fide* in the "ordinary course of such business," when not for speculative or gambling purposes. That no other businesses or persons are mentioned as authorized to deal *bona fide* for the purchase of commodities on "margin," is not an implied restriction upon others to do an act not forbidden by any statute.

Section 7 does not confer any exclusive right or privilege upon manufacturers or wholesale merchants. It does not authorize them to engage in any business prohibited by the act of 1889. It does not authorize them to speculate in cotton or other commodities. It simply provides that the courts shall not construe the act of 1905 to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business.

The defendant further contends that by section 5, chapter 538, Laws 1905, proof that nothing was actually delivered at the date of the contract and that a "margin" was put up, shall be *prima facie* evidence that the contract is a "wagering" one and forbidden by chapter 221, Laws 1889, and that section 7, chapter 538, Laws 1905, providing that this last act shall not apply to purchases or sales by

manufacturers or wholesale merchants of the necessary commodities required in the ordinary course of their business, is a discrimination forbidden by the 14th amendment. We do not think so, for the prescribing when and under what circumstances and as to what offenses a certain act shall be *prima facie* evidence, is necessarily a matter left to legislative discretion in the exercise of the police power. There may be good reasons why the purchase of "necessary commodities required in the ordinary course of their business" for future delivery on a "margin," by manufacturers and wholesale merchants, shall not raise a presumption that such dealings are "wagering" contracts, while purchases by them, not of such commodities, or when not "required in the ordinary course of their business," or the purchase by others of any commodities, when made on the deposit of a "margin" and for "future" delivery, shall raise the presumpton of a "wagering" contract.

21 Whether the reason is good and sound for making the purchase of commodities upon "margin" *prima facia* evidence of a "wagering" contract, under a certain state of facts, and providing that upon a different state of facts such purchase upon "margin" does not constitute *prima facie* evidence of a "wagering" contract, is a matter for the legislature. The courts have no veto power upon such exercise of the police power. State *v.* Barrett, at this term.

But aside from what we have already said, the defendant is indicted for carrying on a "bucket shop" business. The legislature had unquestioned power to make such business indictable. Booth *v.* Ill., 184 Ill., 425, and other cases cited, *supra*. The facts found are that the defendant was carrying on the forbidden business. It can in no wise affect the validity of the statute making such business indictable that the purchase of commodities by others upon "margin," shall under certain circumstances raise a *prima facie* case that such purchases were void, and under other circumstances shall not constitute such *prima facie* evidence. A statute may be void in part and valid in part. If the provision as to *prima facie* evidence, as to certain purchases, upon "margin" were null, because not applying to all purchases upon "margin," this would in no wise invalidate that part of the statute which forbids carrying on the business of running a "bucket shop." The defendant is not indicted for buying commodities for future delivery upon a "margin;" nor are manufacturers and wholesale merchants, nor any one else, exempted from the prohibition of carrying on the "bucket shop" business. Upon the special verdict the defendant was properly adjudged guilty.

No error.

22 (Title of Cause.)

Judgment.

This cause came on to be argued upon the transcript of the record from the superior court of Wake county:—upon consideration

whereof, this court is of opinion that there is no error in the record and proceedings of said superior court.

It is therefore considered and adjudged by the court here, that the opinion of the court, as delivered by the Honorable Walter Clark, chief justice, be certified to the said superior court, to the intent that proceedings be had therein in said cause according to law. And it is considered and adjudged further, that the defendant and surety do pay the costs of the appeal in this court incurred, to-wit, the sum of twenty eight 80/100 dollars ($28.80), and execution issue therefor.

23 Supreme Court of North Carolina.

I, Thos. S. Kenan, clerk of the supreme court of North Carolina do hereby certify that the foregoing is a full and true copy of the record in the case of The State of North Carolina against Ernest Gatewood and also of that of State *v.* E. C. McGinnis, as appears on file in this court. Given under my hand and seal of said court at office in Raleigh on this 23rd. day of August, 1905.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN,
Clerk Supreme Court.

Endorsed on cover: File No. 19,888. North Carolina supreme court. Term No. 386. Ernest Gatewood, plaintiff in error, *vs.* The State of North Carolina. Filed August 26, 1905. File No. 19,888.

Office Supreme Court U. S.
FILED
OCT 23 1905
JAMES H. McKENNEY,
Clerk.

FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 105

ERNEST GATEWOOD, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

MOTION TO ADVANCE.

Plintiff in error, Earnest Gatewood, moves the court to advance this case, and assigns the following reasons for this application, to-wit:

STATEMENT OF MATTER INVOLVED.

He is under indictment and conviction for violating Chapter 538, Laws 1905, of the State of North Carolina, to-wit: For opening and operating an office at Roxboro, North Carolina, for the purpose of carrying on and engaging in the business of entering into contracts to sell and deliver agricultural products, stocks, etc., for future delivery, and also for receiving an order to purchase on margin one hundred bales of cotton for future delivery, and for receiving a deposit of $50.00 by way of margin to cover fluctuations in the price of said cotton. He is under same indictment and conviction for posting and publishing information over his wires of the fluctuations in prices of grain, provisions and bonds. A special verdict was found by the jury. A fine was entered by the trial court against the plaintiff in error, and the judgment of the trial court was affirmed on appeal to the Supreme Court of North Carolina.

REASONS FOR APPLICATION.

1. This is a criminal action, and plaintiff in error is under sentence to pay a fine for violating an act of the General Assembly of North Carolina.

2. Plaintiff in error contends that the said act of the Legislature of North Carolina is not in harmony with the Constitution of the United States, and that it violates Section 1 of the 14th Amendment of the Constitution of the United States, the guarantee of equal protection of the laws.

3. The opinion of the Supreme Court of North Carolina in this case, upholding the constitutionality of Chapter 538, Laws 1905, has closed out and broken up the business of plaintiff in error in Durham, N. C., and of many other brokers and stock dealers in the towns and cities of North Carolina. This matter is, therefore, one of State interest and importance, affecting at least a score of financial institutions.

Wherefore, plaintiff in error prays the court that his cause may be advanced, and that as early an argument of the same may be had as is convenient to this court. And as in duty bound he will ever pray.

October 9th, 1905.

ROBERT W. WINSTON,
VICTOR S. BRYANT,
Attorneys for Plaintiff in Error.

FILE COPY.

Office Supreme Court U. S.
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Clerk.

BRIEF OF PLAINTIFF IN ERROR.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905

No. 105

ERNEST GATEWOOD, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

ROBERT W. WINSTON,

VICTOR S. BRYANT,

Attys. for Pltff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 386.

ERNEST GATEWOOD, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

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STATEMENT OF FACTS.

Plaintiff in error is operating in Roxboro, N. C., an office for the purpose of carrying on or engaging in the business of entering into contracts to sell and deliver stocks, bonds, etc., for future delivery. On the 10th of April, 1905, he received an order to purchase one hundred bales of cotton for future delivery. The purchaser deposited with him, by way of margin, $50.00 to cover fluctuations in the price of said cotton. Settlement by said parties was agreed to be made upon the difference in value of said cotton at that date and the date of delivery. The defendant, likewise, posted and published in his office at Roxboro, on the 10th of April, information showing the fluctuations in the prices of grain and other commodities. In other words, the things which defendant did are claimed to be criminal under an Act of General Assembly of North Carolina, to-wit: Laws of 1905, Chapter 538, which is as follows:

"The General Assembly of North Carolina do enact:

SECTION 1. That it shall be unlawful for any person, corporation or other association of persons, either as principal or agents, to establish or open an office or other place of business in this State for the purpose of carrying on or engaging in any such business as is forbidden in this Act or in Chapter 221 of the Public Laws of North Carolina of 1889.

SEC. 2. Any person, corporation or other association of persons, who shall as principal or agents, violate Section 1 of this Act shall be guilty of a misdemeanor, and upon conviction thereof shall be fined and imprisoned, at the discretion of the Court.

SEC. 3. That no person shall be excused on any prosecution under Chapter 221 of the Public Laws of 1889 and the amendments thereto, from testifying touching anything done by himself or others contrary to the provisions of said Act and the amendment; but no discovery made by the witness upon such examination shall be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offense so done or participated in by him.

SEC. 4. That in all prosecutions under said Act and amendment, proof that the defendant was a party to a con-

tract, as agent or principal to sell and deliver any article, thing or property specified or named in said Act, Chapter 221, Public Laws of 1889, or that he was the agent directly or indirectly of any party in making, furthering or effectuating the same, or that he was the agent or officer of any corporation or association, or person in making, furthering or effectuating the same, and that the article, thing or property agreed to be sold and delivered was not actually delivered, and that settlement was made or agreed to be made, upon the difference in value of said article, thing or property shall constitute against such defendant *prima facie* evidence of guilt.

SEC. 5. That proof that anything of value agreed to be sold and delivered was not actually delivered at the time of making the agreement to sell and deliver, and that one of the parties to such an agreement deposited or secured, or agreed to deposit or secure what are commonly called "margins," shall constitute *prima facie* evidence of a contract declared void by Chapter 221 of the Public Laws of 1889.

SEC. 6. That proof that any person, corporation or other association of persons, either principals or agents, shall establish an office or place where are posted or published from information received the fluctuating prices of grain, cotton, provisions, stocks, bonds and other commodities or of any one or more of the same, shall constitute *prima facie* evidence of being guilty of violating Section 1 of this Act, and of Chapter 221 of the Public Laws of 1889.

SEC. 7. That this Act shall not be construed so as to apply to any person, firm, corporation, or his or their agent, engaged in the business of manufacturing or wholesale merchandising, in the purchase or sale of the necessary commodities required in the ordinary course of their business.

SEC. 8. This Act shall be in force from and after its ratification.

Ratified March 6th, 1905."

It is deemed material also to set out the Act of 1889 referred to in the above Act. Laws of 1889, Chapter 221, is as follows:

"The General Assembly of North Carolina do enact:

SECTION 1. That every contract, whether in writing or not, whereby any person or persons, corporation or corpora-

tions, shall agree to sell or deliver any cotton, Indian corn, wheat, rye, oats, tobacco, meal, lard, bacon, salt, fish, beef-cattle, sugar, coffee, stocks, bonds, and choses in action, at a place or places and at a time or times specified and agreed upon therein, to any person or persons, corporation or corporations, whether the person to whom such article is so agreed to be sold and delivered shall be a party to such contract or not, when, in fact, and notwithstanding the terms expressed in such contract, it is not intended by the parties thereto that the articles or things so agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them that money or other thing of value shall be paid to the one party by the other, or to a third party, the party to whom such payment of money or other thing of value shall be made to depend, and the amount of such money or other thing of value so to be paid to depend upon whether the market price or value of the article so agreed to be sold and delivered is greater or less at the time and place so specified than the price stipulated to be paid and received for the articles so to be sold and delivered; and every contract commonly called 'futures' as to the several articles and things hereinbefore specified, or any of them, by whatever other name called, and every contract as to the said several articles and things, or any of them, whereby the parties thereto contemplate and intend no real transaction as to the article or thing agreed to be delivered, but only the payment of a sum of money or other thing of value, such payment and the amount thereof and the person to whom the same is to be paid to depend on whether or not the market price or value is greater or less than the price so agreed to be paid for the said article or thing at the time and place specified in such contract, shall be utterly null and void and of no effect in law or equity; and no action shall be maintained in any Court in this State to enforce any such contract, whether the same was made in or out of the State, or partly in and partly out of this State, and whether made by the parties thereto, by themselves or by or through their agents, immediately or mediately; nor shall any party to any such contract, or any agent or agents of any such party, directly or remotely connected with any such contract in any way whatever, have or maintain any action or cause of action on account of any money or other thing of value paid or advanced or hypothecated by him or them in connection with or on account of such contract and agency.

SEC. 2. That when the defendant or defendants in any action pending in any Court in this State shall allege specifically in his or their answer that the cause of action alleged in the complaint is in fact founded upon a contract such as is by this Act made void, and such answer shall be verified, then, and in that case, the burden shall be upon the plaintiff in such action to prove by the proper evidence thereof, that the contract sued upon is a lawful one in its nature and purposes; that the defendant may likewise produce evidence to prove the contrary: *Provided, nevertheless,* That any allegation or statement of fact made in any pleading in any such action, or the evidence produced on the trial in any such action, shall not be evidence against the party making or producing the same in any criminal action against such party.

SEC. 3. That every person who shall become a party to any such contract as is by this Act made void, and every person who shall be the agent, directly or indirectly, of any such party in making or furthering or effectuating the same; and every agent or officer of any corporation who shall, in any way or manner, knowingly aid in making or furthering any such contract to which such corporation shall be a party, shall be deemed gulty of a misdemeanor, and on conviction in the Superior Court shall be fined not less than one hundred dollars nor more than five hundred dollars, and may be imprisoned in the discretion of the Court.

SEC. 4. That every person who shall, while in this State, consent to become a party to any such contract made in another State, and every person who shall, as agent of any person or corporation who shall become a party to any such contract made in another State, in this State do any act, or in any way aid in this State in making or furthering such contract so made in another State, shall be deemed guilty of a misdemeanor, and on conviction in the Superior Court shall be fined not less than fifty or more than two hundred dollars, and may be imprisoned in the discretion of the Court.

SEC. 5. This Act shall be in force from and after its ratification.

Ratified the 25th day of February, A. D. 1889."

The defendant was not indicted or convicted for violating the Act of 1889, or any portion of the same.

The special verdict in this case differs from the special verdict in *State* v. *McGinnis* at the same term, and yet the

Supreme Court of North Carolina filed its opinion affirming the lower Court upon the authority of *State* v. *McGinnis.*

Among other differences, we deem it essential to call attention to the fact that in the *Gatewood case* the defendant's guilt as found in the special verdict of the jury depended, to some extent at least, upon the provision of Section 5 of Act of 1905, whereas in the *McGinnis case* the special verdict did not refer to or embrace such things as are condemned by Section 5 of Act of 1905.

ASSIGNMENTS OF ERROR.

Plaintiff in error assigned as grounds of error:

That Chapter 538, Laws of 1905, is in conflict with Section 1 of the 14th Amendment of the Constitution of the United States: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

ARGUMENT.

The question presented, therefore, is whether the Act of the North Carolina Legislature, as passed in 1905, is valid or invalid. The contention of the plaintiff-in-error is that Sec. 7 vitiates the entire Act, it being inconsistent with the Constitution of the United States by reason of the fact that it declares that *"this Act shall not be construed so as to apply to any person, firm, corporation or his or their agent engaged in the business of manufacturing or wholesale merchandising in the purchase or sale of the necessary commodities required in the ordinary course of their business."* Also that the presumptions created in the Act are within the prohibition against the deprivation of property without due process of law.

The Supreme Court of North Carolina in construing the same make no reference to *Conolly* v. *Union Pipe Company,* 184 U. S., 540, although it seems to be a case quite on all-fours with it. The *Conolly case* involved the construction of the Anti-Trust Act of the Legislature of Illinois, one section of which provided that *"the provisions of this Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."* This provision was held to

vitiate the entire Act as it impinged on the 14th Amendment of the Constitution of the United States and was class legislation.

The North Carolina Act under consideration evidently means that a wholesale merchant or manufacturer or an agent of theirs, when engaged in purchasing or selling commodities required in the ordinary course of their business, is not liable to the provisions of such legislation. That is to say "A," a wholesale merchant, or his agent, can buy or sell "on margin," making a small deposit to cover fluctuations of the market, all necessary commodities, so as to "hedge" in his business, and his conduct in so doing is not criminal or presumptively so, while "B," in the like circumstances, is presumably guilty of a crime. The North Carolina Court declares that "there may be good reasons why the Legislature made this discrimination," and whether such reason is good and sound or the contrary, "Courts have no veto power upon such exercise of the police power," citing *State* v. *Barrett,* 50 S. E. R., 506.

The police power of the State, we submit, does not extend so far as this. The *Barrett case, supra,* cited as authority for this position, fails to sustain it, we think. In this case the Supreme Court of North Carolina upheld the constitutionality of an Act of its Legislature which provided that it should be unlawful to sell liquor in certain territory, and which also provided that the keeping in his possession by any person of more than a quart of spirits raised the presumption that he was a dealer. This decision upholds the power of the Legislature to make an apparently innocent act criminal, but does not consider the question of class legislation, for no such question was presented. May we not, however, believe that the decision in *Barrett's case* will not stand the test should it finally reach this Court for review. As has been said by this Court, every individual is entitled not only to the equal protection of the laws, but also to the protection of equal laws. Now a law which raises a presumption of guilt when "A" does some act, but which fails to raise such presumption when "B" does the same act is not an equal law. A manufacturer has on hand a large lot of cotton on a declining market. To protect his mill he sells cotton and puts up a margin. He is not guilty under the Act of the North Carolina Legislature. But a country merchant, having on hand a lot of cotton which he took in barter, and the market declining, sells on margin to hedge and he is guilty. In the *Conolly case* the defense

that the statute was in exercise of the police power of the State was disposed of by the Supreme Court of the United States, as follows:

"The question of Constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the State, which, as often stated by this Court, were not included in the grants of power to the general government, and therefore were reserved to the States when the Constitution was ordained. But the Constitution of the United States is the supreme law of the land, anything in the constitution or the statutes of the States to the contrary notwithstanding, and a statute of a State, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a State enactment, whatever may be the source from which the power to pass such enactment may have been derived. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health, and the public safety; but if, by their necessary operation, its regulations looking to either of those ends amount to denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

The defense that the objectionable section could be eliminated and the remainder of the Act enforced was disposed of as follows:

"The principles applicable to such a question are well settled by the adjudications of this Court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the entire statute must be held inoperative. The first section of the Act here in question embraces by its terms *all* persons, firms, corporations, or associations of persons who combine their capital, skill or acts for any of the purposes specified, while the 9th Section declares that the statute shall not apply to agriculturalists or live-stock dealers in respect to their products or stock in hand. If the latter section be eliminated as unconstitutional, then the Act, if it stands, will apply to

agriculturalists and live-stock dealers. Those classes would in that way be reached and fined, when, evidently, the Legislature intended that they should not be regarded as offending against the law, even if they did combine their capital, skill, or acts in respect to their products or stock in hand. Looking, then, at all the sections together, we must hold that the Legislature would not have entered upon or have continued the policy indicated in the statute unless agriculturalists and live-stock dealers were excluded from its operation, and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and in that view it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the 9th Section. Whether it is also within the prohibition against the deprivation of property without due process of law is a question which it is unnecessary to consider at this time."

In respect to what constitutes a denial of the equal protection of the laws, the Court said:

"But upon this general question we have said that the guaranty of the equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

The Court said further:

"In *Hayes* v. *Missouri*, 120 U. S., 68, we said that the 14th Amendment required that all persons subject to legislation limited as to the objects to which it is directed, or by the territory within which it is to operate 'shall be treated alike, under like circumstances and conditions, both in privileges conferred and in the liabilities imposed.' 'Due process of law and the equal protection of the laws,' this Court has said, 'are secured, if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government.' "

The Supreme Court of North Carolina in its opinion in this case say that this Act was doubtless hastily drawn, for "Section 7 is clearly not germane to the statute which is for the prohibition of the establishment or opening an office for the purpose of engaging in or carrying on the business of a Bucket Shop." However hastily the Act may have been drawn, it must conform to the Constitution of the United States. In the opinion of the Supreme Court of North Carolina, it is stated that Section 7 was added to the bill "in the

second house and after it had passed the first house." We submit that this fact strengthens our contention that Section 7 is intended, as it is expressed, to accomplish a definite purpose, to-wit: to exempt wholesale merchants and mill men. It will be noted that Section 7 is very general in its terms, embracing "*any* person, firm, corporation or his or their agent," and it clearly appears that a manufacturing establishment or a wholesale merchant may employ an agent to purchase or sell necessary commodities in the course of their business, and to this end that said agent can with impunity, without any presumption of guilt, disregard the Act and not be amenable to the punishment embraced in Section 4, Section 5 and Section 6 of said Act. Indeed such an agent would not fall under the condemnation of Section 3 of said Act, and no discovery touching anything done by himself or others contrary to the provisions of the Laws of 1889 could be enforced.

Considering Section 7 in detailed connection with each of the other sections of the Act, it appears conclusively that Section 7 is in the nature of a proviso to each of the other sections; and such connection is established by the phraseology of Sec. 7, for in the beginning it says: "That this Act shall not be construed," etc., which means that no part or provision of the Act shall be so construed as to apply to the excepted classes.

Hence, when appended to Section 1, which is as follows: "SECTION 1. That it shall be unlawful for any person, corporation, or other association of persons, either as principal or agents, to establish or open an office or other place of business in this State for the purpose of carrying on or engaging in any such business as is forbidden in this Act, etc., in Chapter 221 of the Public Laws of North Carolina of 1889," it would read, provided that manufacturers and wholesale merchants may deal and trade in the manner forbidden by this section, if they confine their operations to such commodities as are necessary in the ordinary course of their business.

It will become apparent upon a careful reading of the exception, "in the purchase or sale of the necessary commodities required in the ordinary course of their business," that the limitation is upon the class of commodities bought and sold, and not upon the *manner of the "purchase or sale."* Indeed, the whole scope and purpose of the Act is directed to the prevention of certain modes or methods of dealing or

speculation, regardless of the article, product or commodity that is purchased or sold; and the *only* purpose and effect of Section 7 is to remove all restrictions, which would be otherwise imposed by the Act, upon the mode or manner of purchase and sale by manufacturers and wholesale merchants of such articles and commodities as are handled in their usual course of business. So that if the purchase or sale is made by a manufacturer or wholesale merchant, and the commodity is such as falls within his line of business, all restriction imposed generally by the Act is removed, and it does not apply.

Likewise as to Section 2 of the Act, which is as follows:

"SECTION 2. Any person, corporation or other association of persons, who shall, as principal or agent, violate Section 1 of this Act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined and imprisoned in the discretion of the Court."

Provided this section shall not be construed so as to apply to manufacturers or wholesale merchants, if they shall confine their speculations to commodities within their respective lines of business.

The other sections of the Act, 3, 4, 5 and 6, are concerned with the establishment of proof alone, and the creating of certain artificial and arbitrary presumptions from certain predicaments of fact, but Section 7 is also to be appended to each as a proviso. Hence, notwithstanding the admission of any of the facts specified in these sections of the Act by the manufacturer, or wholesale merchant, no presumption of guilt arises and he is relieved from the burdensome and disgraceful presumption of crime which is cast upon all the other people under like circumstances. This conclusion cannot be avoided, because of the language of the law itself. *Lex ita scripta est.*

Section 7 was an amendment engrafted upon the bill after it went to the Senate, it having originated in the House of Representatives, and was adopted and reported by the committee in charge at the urgent request of the cotton-mill men and wholesale dealers, whose representatives were heard in debate and who argued at length the advisability of incorporating the amendment.

The case of *Conolly* v. *Union Sewer Pipe Co.* has been uniformly followed by Courts since its rendition, and we respectfully call the attention of this Court to the following cases in which it is cited:

In *Union Co. National Bank of Liberty* v. *Ozan Lumber* Co., 127 Fed. Rep., 211, the Court decided that the law of the State of Arkansas requiring all negotiable instruments taken in payment for any patent medicine or thing, or any patent right, to be on a printed form stating the consideration on its face, and declaring all such notes not showing on their face for what they were given absolutely void, but which further provided that "this Act shall not apply to merchants and dealers who sell patented things in the usual course of business," is void as in violation of the provisions of the 14th Amendment to the Federal Constitution, that no State shall deny to any person within its jurisdiction the equal protection of the laws.

In *Brown* v. *Jacobs Pharmacy Co.,* 115 Ga., 453, the Court held that the Georgia statute of 1896, known as the Anti-Trust Act, which provided that the provisions of the Act should not apply to agricultural products or live stock in the possession of the producer or raiser, was unconstitutional by reason of the exemption stated.

In *State* v. *Mitchell,* 79 Me., 66, the Court held that the statute (Chapter 227, Laws 1901), which undertook to exact a license from all hucksters and peddlers and to exempt all residents of the town who paid taxes amounting to $25 on their stock of goods, was void because it imposed an arbitrary and unreasonable discrimination, and that the statute could not be effectuated by disregarding the exemption and exacting a license from all persons; that the legislative intent would be violated by requiring persons, who had been declared exempt, to pay license. In this case the exemption was as follows: "But any resident of a town having a place of business therein and paying taxes to the amount of $25 on his stock in trade, can peddle goods in his own town without paying license fee whatever."

In *Matthews* v. *People,* 202 Ill., 389, the Court says: "Section 8 of the free employment agency Act of 1899, which prohibits superintendents of agencies from furnishing workmen or lists of workmen to employers whose men are on a strike or lock-out, is in aid of strikes, regardless of their justice, is repugnant to the Constitution, and being inseparable from the other provisions, the whole Act is void. The Legislature has no power to deny to an employer whose men are out on a strike or lock-out, the right to obtain workmen from free employment agencies and at the same time grant such right to other employers not similarly situated. The

Court says: "That is a principle, as laid down in *Conolly* v. *Union Sewer Pipe Co.*, which is precisely applicable to the present case, where a greater burden is imposed by Section 8 upon employers who are subjected to strikes and lock-outs, than upon other employers in the same calling and condition who are not subject to such strikes and lock-out, irrespective of the justice or propriety of the strike or lock-out."

In *Standard Oil Co.* v. *Spartanburg*, 66 S. C., 37, the Court says: "We come now to the consideration of the most important question in the case, which is whether the exemption from taxes of those merchants and dealers handling oils on which the license had been paid, was a reasonable classification. It cannot be successfully contended that the exemption from the payment of the license tax was intended for the benefit of the municipality, for the tendency of the classification was to lessen its revenue; nor can it be argued that the exemption was in any sense an encouragement to commerce, for the merchants and dealers under this classification conducted their business in no respect different from those who paid the license tax. It can scarcely be insisted that it was for the benefit of those who paid the tax, as its tendency was to create a large number of competitors in business with them, especially when we have before us one of the parties who paid the tax, objecting to its illegality. We are irresistibly forced to the conclusion that the exemption was intended as a mere favor to those included within the classification, and it was therefore unconstitutional."

In *Kellyville Coal Company* v. *Harrier*, 207 Ill., 624, the Court says: "Sections 3 and 4 of an Act to provide for the payment of wages in lawful money and to prohibit the trucking system and to prevent deductions from wages, except for lawful money actually advanced, is unconstitutional, because the Legislature has no power to provide that one possessed of property may not sell it to another and agree that the latter shall work in payment. The exemption of farmers from the operation of the above sections, prohibiting employers from setting off debts of employees against claim for wages, creates an unjust discrimination which invalidates the Act. The exemption is contained in Section 6 of the Act, as follows: 'Nothing in this Act shall be so construed as to include the business of farmers, or farmer laborers or servants.'"

In *Greenwich Ins. Co.* v. *Carroll*, 125 Fed. Rep., 129, the Court says: "The provisions of the Iowa Code, Section 1754, which makes it unlawful for two or more fire insurance

companies doing business in the State to enter into any agreement as to the amount of commissions to be allowed agents, or as to the manner of transacting fire insurance business in the State, are invalid, as depriving insurance companies of the liberty of contract secured to all persons by the 14th Amendment and to the equal protection of the laws."

In *Ballard* v. *Mississippi Cotton Oil Co.*, 81 Miss., 507, the Court says: "Whenever the Court finds on the face of a statute a number of different provisions, some constitutional and some not, it may sever them, if they are not interdependent, striking out the unconstitutional provisions and allowing the valid ones to stand. This is what is meant by the severance of a statute; but whenever a Court, in order to uphold the constitutionality of a statute, has to interpolate therein provisions not put there by the Legislature, this is no case of severance or a proper limitation of the provisions which are in the statute by judicial construction. Such action is nothing less than pure judicial legislation, and this cannot be defensible."

In *In re Pell*, 181 N. Y., 48, the Court says: "Chapter 76 of the Laws of 1899, providing for tax upon remainders and reversion which had vested prior to June 30, 1885, upon their coming into actual possession or enjoyment is upon its face an amendment to the tax law relating to transfers of property (Laws of 1896, Chapter 908), and imposes a tax upon the right of succession to property; it is not an exercise of legislative power imposing a direct tax thereon and is unconstitutional and void because it diminishes the value of vested assets, impairs the obligation of a contract and takes private property for public use without compensation; if, however, it should be regarded as imposing a direct tax upon property, the same result would follow, for the reason that it discriminates against a limited class of remaindermen and imposes the burden unequally upon the owners of an estate sought to be taxed."

Citing from *Conolly* v. *Union Sewer Pipe Co.*, the Court says: "The difficulty is not met by saying that generally speaking the State when enacting laws may, in its discretion, make a classification of persons, firms, corporations and associations in order to subserve public objects, for this Court has held that a classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can

never be made arbitrarily and without any such basis, but arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. No duty rests more imperatively upon the Courts than the enforcement of those constitutional provisions intended to secure the equality of rights which is the foundation of free government. In this case it was insisted by Pell that the statute was invalid for two reasons: first, the law does not subject to the tax a class of property, but it does subject certain discriminating persons divined by the character of their ownership to the payment of the tax; second, the law does not apportion the burden equally upon all the owners designated, but discriminates between different owners; the measure of the property tax imposed as to some owners is 5 per cent.; others only 1 per cent., and still others it is nothing."

In *People* v. *Orange Co. Road Construction Co.*, 175 N. Y., 84, the Court says: "A statute prohibiting any person or corporation from contracting with the State or a municipal corporation from requiring more than eight hours' work per day, and making a violation thereof a misdemeanor, is unconstitutional and void, as it creates an arbitrary distinction between persons contracting with the State and a municipality and other employers of labor, thus violating the provisions of the 14th Amendment to the Federal Constitution."

The *Conolly case* is cited in the case of the *State of Texas* v. *The Shippers Compress and Warehouse Co.*, 95 Texas, 603. This case involved the construction of the Texas anti-trust law of 1895, which contained a provision that it should not be held to apply to live-stock or agricultural products in the hands of the producer or raiser, nor should it be understood or construed to prevent the organization of laborers for the purpose of maintaining any standard of wages. In this case the Texas Court, referring to the *Conolly case*, says: "In the case of *Conolly* v. *Union Sewer Pipe Co.*, the Supreme Court of the United States held that a statute of the State of Illinois in all essential particulars the same as the Act of 1895, was in conflict with the 14th Amendment to the Constitution of the United States, because it excepted agricultural products and live-stock while in the hands of the producer or raiser. We recognize the superior authority of the Supreme Court of the United States upon this question and in obedience to this decision we shall hold,

that in it so far as the Law of 1905 comes within the terms of the *Conolly case*, it is invalid; it will not support an action by the State to recover a penalty for violation of the law, nor will it in suits between corporations or individuals consider a defense based upon the fact that the right of action originated in a violation of the anti-trust law."

The case of the *State of Texas* v. *Laredo Ice Co.*, 96 Texas, 461, was instituted to recover penalties for a violation of the anti-trust law of 1899. The law of 1899 did not contain the provision of the law of 1895 exempting certain persons from the operation of the law. It was contended, however, that as a section of the law of 1899 contained a provision that the law should be held to be cumulative of all laws now in force in the State, that this provision made one law of the Act of 1899 and the Act of 1905 and that the exculpatory provisions of the former became part of the latter, and therefore made it unconstitutional under the *Connolly case*. The Supreme Court of Texas, however, rejected this contention and held that it was not cumulative in the sense suggested and did not contain as part of the law the discriminating feature of the Act of 1895, and was therefore constitutional—constitutional because *it did not contain such exception.*

In the recent case of the *National Cotton Oil Co.* v. *The State of Texas*, Supreme Court Advance Sheets, October Term, 1904, No. 9, p. 379, the simple question decided was, that the State of Texas had a right to withdraw its license from any foreign corporation to do business within the State, although the statute imposing the conditions upon which such foreign corporation could do business was unconstitutional.

This case followed the case of *Doyle* v. *Ins. Co.*, 94 U. S., 635, that the State had a right to oust a foreign company if it removed its cases to the Federal Court, not because removals were a good reason for ousting the company, but because the State had the right to exclude it without reference to the reason. As is said in the case of *R. R. v. State*, 31 N. J. Law, 531, "it is not denied that the corporate existence of a company is recognized not by right, but by grace, in foreign jurisdictions and that each government has the right to refuse to recognize such existence, except on its own conditions.

THE ACT OF 1905 RENDERS VOID THE ACT OF 1889.

It is plain that the Act of 1889 was a dead letter until the Act of 1905 vitalized it by making certain innocent things presumptive evidence of guilt.

Now, by express legislative enactment, the Act of 1905 is incorporated into the Act of 1889, so that a retail merchant, under Section 1 of the Act of 1889, cannot recover if he sue upon a contract where he has put up a margin, but a wholesale merchant can recover under like conditions. If we understand the opinion of the Supreme Court of North Carolina, Section 5 of the Act of 1905, wherein it is provided that the putting up of a margin is presumptive evidence that one has violated the Act of 1889, taken in connection with Section 7, is a discrimination in favor of the wholesale dealer and the manufacturer as against the retail dealer and others, but the Court says that such discrimination is permissible under the police power of the Legislature. We have seen that in the *Conolly case* the opposite seems to be law. Now, if only one material section, to-wit: Section 7 of the Act of 1905, is a discrimination in favor of the manufacturer and wholesale dealer, in so far as it relates to Section 5 of said Act, we maintain that the whole Act is just as effectually void as if the North Carolina Supreme Court had held all of said sections to be discriminative.

It is certain that when a manufacturer or wholesale dealer goes upon the market to buy or sell necessary commodities in the course of his business he may lawfully put up a margin, i. e., hedge. Now Section 1 of the Act of 1889 makes this a void contract. Section 2 permits the defendant to suggest in his answer that it is that kind of a contract and throws the burden on the plaintiff to show the contrary and Section 3 makes it a felony. But Section 7 and Section 5 of the Laws of 1905 expressly exempt from the operations of the Act of 1889, under these same conditions, any and all persons engaged in the business of manufacturing, etc. Is it not plain therefore that the Act of 1889 is still a dead letter so far as concerns manufacturers and wholesale dealers, but that it is quite effectual to prevent the rest of mankind from purchasing on a margin? It will be noted that this view was not considered or adjudged by the Supreme Court of North Carolina in its opinion in this case.

Is the Act Unconstitutional Because it May Deprive a Person of Property or Liberty Without Due Process of Law?

"The constitutional validity of a law is to be tested, not by what has been done under it, but by what may by its authority be done." *Stuart* v. *Palmer,* 74 N. Y., 183.

Considering the Acts of 1889 and of 1905 together, we discover that under their authority property may be confiscated. Let us suppose that there is an agreement to sell a car of corn, a part of the price is paid by way of margin, the corn is not actually delivered. Such a transaction under Section 5 of the Laws of 1905, would be *prima facie* void, and under Section 2 of the Act of 1889 if the seller sue upon the contract, and offer the writing alone in evidence, he fails to recover. Not only so, but by Section 5 the seller and the buyer will thereby be parties to a contract denounced by the Act of 1889, and no doubt subject to the pains and penalties of Sections 3 and 4 of the Act of 1889.

We maintain that the Act of 1905 is unusual in its artificial presumptions and in the manner in which it is engrafted upon the Act of 1889 and that it is not in harmony with the letter or spirit of the Constitution. The following cases are illustrative of the point at issue:

Munn v. *Illinois,* 94 U. S., 113.
Lawton v. *Steele,* 152, U. S., 133.
Colon v. *Lisk,* 153, N. Y., 188.

The following cases decide that presumptions of guilt attempted to be raised by acts of Legislatures are void:

People v. *Lyon,* 27 Hun., 180.
State v. *Beswick,* 13 R. I., 218.
State v. *Beach,* 43 N. E. R., 951.
Cummings v. *Missouri,* 4 Wall., 328.
Wynehamer v. *People,* 13 N. Y., 446.
San Mateo v. *R. R.* (C. C.), 13 Fed., 722.

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Brief in Reply of Plaintiff in Error

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 105.

ERNEST GATEWOOD, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

ROBERT W. WINSTON,
VICTOR S. BRYANT,
Att'ys for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES

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ERNEST GATEWOOD, PLAINTIFF IN ERROR,

vs.

THE STATE OF NORTH CAROLINA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

Can the Statute of 1905 Be Upheld Because a Part of It May Be Constitutional?

The true rule is laid down by this Court in the Connolly case, if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the entire statute must be held inoperative. As was said in that case by Mr. Justice Harlan speaking for this Court: "If Section 9 of the Ohio statute be eliminated as unconstitutional, then the act, if it stands, will apply to live stock dealers and agriculturists. These classes would in that way be reached and fined when evidently the Legislature intended that they should not be regarded as offending against the law, even if they did combine their capital and skill in respect to their products or stock in hand. The result is that the statute must be regarded as an entirety and unconstitutional." So in this case, if Section 7 be eliminated from the Statute of 1905, the Act will apply to the two excepted classes, wholesale dealers and manufacturers, and they would be reached and punished and would be burdened with the presumptions of guilt, when the Legislature evidently intended that they should not be regarded as presumptively guilty or as offending against the law. As was well said in Stuart v. Palmer, 74 N. Y., 183, often quoted by this Court with approval, "the constitutional validity of a law is to be tested, not by what has been done under it, but what may, by its authority be done." If one were asked, what is the strength of the Statutes of 1889 and and 1905, of the North Carolina Legislature, he would undoubtedly answer, "The presumptions created in and by the 1905 Statute." Suffice it to say these do not apply to wholesale merchants or manufacturers.

We beg to quote from the printed brief filed in these

cases before the N. C. Supreme Court. It is a part of the history of this legislation that the cotton mill men and wholesale dealers made a hard fight before the Legislature of North Carolina in 1905 and won. But for the insertion of Section 7 in the Statute it would have failed of passage.

They placed their insistence upon the distinct and sole ground that, as it was necessary for them to purchase and keep on hand large quantities of supplies in their lines of business, the prices of which were subject to sudden and widely variant fluctuations, they might frequently sustain serious losses, unless they were allowed to enter the speculative market, and "hedge" or cross-trade against them by dealing in futures.

Such is the purport of the speech of Mr. W. C. Heath, ex-President of the American Cotton Manufacturers' Association, delivered before the Senate Committee, March 2, 1905, the account of which is as follows, as published in the *News and Observer* of March 3, 1905:

> "Following Mr. Guthrie, Mr. W. C. Heath, ex-President of the American Cotton Manufacturers' Association and president and secretary of five cotton mills and a wholesale grocer, spoke most earnestly and picturesquely to the committee in opposition to the bill, explaining the character of transactions on the exchange, and the methods used in business of using the future contracts as insurance against loss in the purchase or sale of large lots of raw material or provisions or manufactured goods.
>
> "He declared that the effect of the passage of the bill would be to seriously cripple industry and commercial pursuits in the State, and would drive many wholesale dealers in spot cotton to other States. As business is now conducted, continuous market quotations are a necessity to the business and manufacturing men."

To the same effect is the statement of Mr. Woodard, the

author of the bill in the House of Representatives, when it had under consideration the concurrence in the Senate amendment, on March 4, 1905, the report of which is as follows:

> "The House had somewhat of a stir on the Senate amendment to the Woodard 'bucket shop' bill, this providing that it not be construed as applying to any person, firm or corporation, or their agent, actually engaged in purchasing goods for manufacture and hedging on these sales.
>
> "Mr. Murphy of Rowan, objected as this would create a privileged class of gamblers. Mr. Woodard explained that this was not so, that it only permitted cotton mill men and wholesalers to buy and hedge on sales made. The amendment, he said, was favored by manufacturers like Senator Long and Odell and Mr. Fries of Winston. The amendment was concurred in, and the Woodard bucket shop bill needs only enrolling and ratification to be a law."

Whenever the construction of a provision of doubtful meaning in the law is to be made, the history of the provision, and the views as expressed in the debates pending its enactment, may be considered in order to arrive at the intention of the law-makers. It does not appear, however, that the proper meaning and intent of Section 7 are doubtful, but if so, the above rule may be invoked.

Mason v. Cranbury Tp. (N. J., 1902), 52 Atl. Rep., 568.

Starnes v. Hill, 112 N. C., 1 (26).

Statement of Hengham, C. J., Year Book, 33 Edw. I, p. 31.

Ash v. Adby, 3 Swanst., 664.

Ex parte Falrey, 40 Fed. Rep., 66.

U. S. v. Wilson, 58 Fed. Rep., 768.

Southerland St. Const., Vol. 2, s. 470.

On 14 June, 1906, the highest Court of Illinois decided

a case (Starnes v. People, 78 N. E. Rep., 61,) illustrating the Court's disapproval of class legislation. The Illinois Legislature had passed a statute requiring mine owners to provide a wash room for its operatives. It was urged that workers in mines were a class to themselves. But the Court of Appeals quoted with approval Judge Cooley to the effect that, "distinctions in these respects should be based upon some reasons which render them important, like the want of capacity in infants and insane persons." Why exclude from the protection of this law men employed in foundries and steel mills? the Court pertinently asks. The act act was declared to be a nullity.

We maintain that the two statutes are so blended and the intention of the Legislature to exempt mill men and wholesale dealers from the operations thereof so clear that, linked like the Siamese twins, you cannot cut the statutes in twain nor include the excepted classes, without doing violence to the legislative intent. The N. C. Legislature convenes in less than 60 days. If they desire to pass an act without strings to it, running bucket-shops and gambling from the State, there is no legal impediment to prevent.

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Durham, N. C., November 4, 1906.

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BRIEF OF DEFENDANT IN ERROR

Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 105.

ERNEST GATEWOOD,

PLAINTIFF IN ERROR,

versus

THE STATE OF NORTH CAROLINA,

DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of North Carolina.

WALTER CLARK, Jr.,

ACTING ATTORNEY-GENERAL OF NORTH CAROLINA,

FOR DEFENDANT IN ERROR.

Supreme Court of the United States,

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versus

THE STATE OF NORTH CAROLINA,

DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

STATEMENT OF THE CASE.

An act of the General Assembly of North Carolina, to-wit, Laws of 1905, chapter 538, made it criminal to operate a "bucket-shop" or to buy or sell for future delivery without intending any actual delivery. The only question presented is whether section 7 of the said act renders the entire act void, as being in conflict with the Fourteenth Amendment of the United States Constitution.

Section 7 is as follows:

> "That this act shall not be construed so as to apply to any person, firm, corporation, or his or their agent, engaged in the business of manufacturing or wholesale merchandising, in the purchase or sale of the necessary commodities required in the ordinary course of their business."

ARGUMENT.

The State contends:

1. That this 7th section does not conflict with the Fourteenth Amendment of the United States Constitution guaranteeing equal protection of the laws.

Now if the section in dispute had been cut off, thus, "This act shall not be construed so as to apply to any person, firm, corporation, or his or their agent, engaged in the business of manufacturing or wholesale merchandising," this might have been class legislation, exempting certain persons, and therefore unconstitutional. But this is not the whole of the section. It contains the following words, also: *"in the purchase or sale of the necessary commodities required in the ordinary course of their business."* This gives these classes no right not given to every one else. This section was added out of superabundant caution. It simply gives these classes the right to buy or sell for actual future delivery. The act does not prevent any one from buying for actual future delivery, but makes it criminal for any person, firm, etc., to buy on margin for future delivery when no actual delivery is intended.

As the Supreme Court of North Carolina in its opinion, 138 North Carolina Report, page 729, said:

> "A purchase for actual future delivery of necessary commodities required in the ordinary course of business, and not for 'wagering' or gambling on the fluctuations of the market, would not be against the statute. The statute of this State does not prohibit all purchases or sales for future delivery, but only such dealings as are in the nature of gambling or wagering contracts. Though section 7 mentions only manufacturing and wholesale mercantile establishments as authorized to make *bona fide* dealings in 'futures,' this was done unnecessarily, we think, and only out of abundant caution. It is not a discrimination, for there

is no prohibition upon any one else or any other business to buy commodities for future delivery *bona fide* in the 'ordinary course of such business,' when not for speculative or gambling purposes. That no other business or persons are mentioned as authorized to deal *bona fide* for the purchase of commodities on 'margin,' is not an implied restriction upon others to do an act not forbidden by any statute.

"Section 7 does not confer any exclusive right or privilege upon manufacturers or wholesale merchants. It does not authorize them to engage in any business prohibited by the Act of 1889. It does not authorize them to speculate in cotton or other commodities. It simply provides that the courts shall not construe the Act of 1905 to have the effect of preventing them from buying and selling for future delivery the necessary commodities required in their ordinary business."

Counsel for the plaintiff in error, relying upon *Connolly v. Union Sewer Pipe Co.*, 184 U. S., p. 540, contend that section 7, hereinbefore quoted, rendered the Act of 1905 unconstitutional. We submit that this contention cannot be sustained, and that the *Connolly case* can be distinguished from the case at bar. In that case the Illinois Trust Act of June 20, 1903, was involved. The first section of the said act embraced *all* persons, firms, or corporations entering into combinations prohibited by the statute, while the 9th section declared that the act should not apply to *agriculturists or live-stock dealers* in respect to their products or stock in hand. If the Act of 1905 had said that *all* persons conducting bucket-shops shall be guilty of a misdemeanor, except *manufacturers or wholesale merchants*, who may be permitted to conduct such enterprises, the doctrine of the *Connolly case* might be invoked, for it would then appear that the Legislature clearly intended that manufacturers and wholesale merchants should be permitted to conduct bucket-shops, while *all* other persons were denied this right. The reason given by this Court in declaring that section 9 rendered the Illinois Trust Act unconstitutional was that the Legis-

lature would not have enacted such a statute *"unless agriculturists and live-stock dealers were excluded from its operation, and thereby protected from prosecution."* Can this Court hold that it was the purpose of the General Assembly of North Carolina in the enactment of section 7 of the Law of 1905 to exempt manufacturers and wholesale merchants from the provisions of the law forbidding the keeping of bucket-shops to permit them to carry on such illegal enterprises and "protect them from prosecution"? This clause was inserted for the purpose of emphasizing the fact that it was not the intention of the General Assembly to affect, by any attempted legislation, contracts of manufacturers or wholesale merchants in the purchase or sale of the necessary commodities required in ordinary course of their business, entered into in good faith and with an actual intention of fulfilment.

The Legislature did not intend to impose any restrictions upon legitimate commerce, but only to destroy the parasite which infests it.

The Constitution of California renders void all contracts for the sale of stocks or margins to be delivered at a future day. It was contended that this constitutional provision did not discriminate between legitimate and illegitimate transactions, and that the same was contrary to the Fourteenth Amendment. The Supreme Court of that State, however, in *Parker v. Otis,* 130 Cal., 322, 329, said:

> "If the provision in question on its face fails to distinguish between *bona fide* contracts and gambling contracts, as is urged, it is none the less a proper police regulation, for the question remains to be determined in each case whether the transaction is in contravention of the Constitution. * * * The Court will always see that legitimate business transactions are not brought under the ban."

And in *Fortenbury v. State,* 47 Ark., 188, the Arkansas statute "was interpreted as applying only to fictitious transactions."

It is submitted that the evident purpose of the Legislature was not to authorize persons engaged in the business of manufacturing or wholesale merchandising to open a place for the purpose of conducting a bucket-shop and carrying on the business of entering into contracts forbidden by the Act of 1889; but the intent was simply to authorize such persons to buy or sell for actual delivery in the future "the necessary commodities required in the ordinary course of their business." As was said in *Connor v. Black,* 119 Mo., 126, the legislation is directed "at keepers of bucket-shops and to individuals or companies engaged in dealing in futures and gambling in grain and other articles of commerce, and *was not designed to affect transactions between commission merchants, their customers and patrons.*"

Inasmuch as section 7 does not confer upon the excepted classes any privileges which they did not before possess, it might be entirely eliminated and the intent of the Legislature in the enactment of the statute preserved.

The State contends:

2. That under the construction put upon this act by the Supreme Court of North Carolina, there is no Federal question presented, as by this construction the act is clearly constitutional. See *State v. McGinnis,* 138 N. C., 724, and *State v. Clayton,* 138 N. C., 732, in which this act was construed. In the present case, *State v. Gatewood,* a *per curiam* order was entered, following the construction placed on the statute by the foregoing decisions, which were filed at the same time.

The decisions of this Court seem to be uniform that when the construction of an act is in doubt and the highest State Court construes it so that it is constitutional, and no Federal question is raised, the Supreme Court of the United States has no juris-

diction. *The plaintiff in error has taken the peculiar position that the State Supreme Court has no right to construe an act so that it is constitutional, and that if it does so construe it, the Supreme Court of the United States should overturn this construction and construe it so that it is unconstitutional, and therefore void.*

In 9 Cranch, 87, *Polk's Lessee v. Wendal,* the Court said:

> "In cases depending on the statute of a State, and more especially in those respecting titles to lands, the Federal courts adopt the construction of the State where that construction is settled and can be ascertained."

In *Elmandorf v. Taylor,* 10 Wheaton, 152, the Court said:

> "The courts of the United States, in cases depending on the laws of a particular State, will, in general, adopt the construction which the courts of the State have given to those laws. This course is founded upon the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government."

In *Green v. Neal,* 31 U. S., 291, it was said:

> "This Court has uniformly adopted the decisions of the State tribunals respectively in the construction of statutes."

In *Davie v. Briggs,* 97 U. S., 638, *Justice Harlan,* after quoting numerous authorities, said:

> "Consequently, our duty is, without reference to our former decisions, to adopt, in this case, the construction which the Supreme Court of North Carolina has given to the limitation statute of that State."

Justice Brewer in *Louisville, etc., Railway Co. v. Mississippi*, 133 U. S., 587, said:

> "The construction of a State statute by the highest court of the State is accepted as conclusive in this Court."
>
> "Where the construction given to a State statute by a State court eliminates the Federal question, the United States Supreme Court has no jurisdiction." *Powell v. Brunswick Co.*, 150 U. S., 442.
>
> "We are bound to accept this conclusion of the State Court as to the proper construction of the statute of the State." *Baltimore Traction Co. v. Baltimore Belt R. R.*, 151 U. S., 137.

The questions just stated are questions of local law, and in determining whether the statute violates any right secured by the Federal Constitution, we must, in the particulars named, accept the interpretation put upon it by the State Court. 180 U. S., p. 466, *Cargill Co. v. Minn.*

It is respectfully submitted that the statute, especially as it has been construed by the Supreme Court of North Carolina, violates no provision of the Constitution of the United States, and that the judgment of that Court should be affirmed.

WALTER CLARK, JR.,
Acting Attorney-General of North Carolina.

Robt. D. Gilmer
Attorney General.

Supreme Court of the United States.

No. 105.—October Term, 1906.

Ernest Gatewood, Plaintiff in Error, vs. The State of North Carolina. } In error to the Supreme Court of the State of North Carolina.

[December 24, 1906.]

Mr. Justice White delivered the opinion of the Court.

North Carolina in 1889 enacted "An act to suppress and prevent certain kinds of vicious contracts." (Laws N. C. 1889, ch. 221.) This law was thus summarized by the Supreme Court of that State in *State* v. *McGinnis*, (138 N. C. 724):

"Section one made void all contracts for the sale of articles therein named for future delivery, wherein (notwithstanding any terms used) it is not intended that the articles agreed to be sold and delivered shall be actually delivered, but only the difference between the contract price and the market value at the time stipulated shall be paid. Section two enacted that when the defense provided by that act is set up in a verified answer the burden shall be upon the plaintiff to prove a lawful contract, but the answer shall not be used against the defendant on an indictment of the transaction. Section three made the parties to such contract, and agents concerned therein, indictable, and section four made persons, while in the State of North Carolina, consenting to become parties to such contract, made in another State, and all agents in the State of North Carolina, aiding and furthering such contract, made in another State, indictable."

In 1905 there was adopted "An act . . . to prevent the dealing in futures." This law contains seven sections. The first and second made it "unlawful for any person, corporation or other association of persons, either as principal or agents, to establish or open an office or other place of business . . . for the purpose of carrying on or engaging in any such business as is forbidden in this act or in chapter 221 of the Public Laws of North Carolina of 1889," and affixed a penalty for so doing. The law of 1889, referred to, is the one of which we have just previously given a summary.

The acts made punishable by the first and second sections of the act of 1905 were thus defined in *State* v. *McGinnis*, *supra*:

"The business forbidden by the act of 1905 is—to avoid a *paraphrasis*, and following the usual American method of describing an act by a word or a phrase—the business of running a 'bucket shop,' which is defined by

the Century Dictionary as 'an establishment, nominally for the transaction of a stock exchange business, or business of a similar character, but really for the registration of bets, or wagers, usually for small amounts, on the rise or fall of the prices of stocks, grain, oil, etc., there being no transfer or delivery of the stock or commodities nominally dealt in.'"

The third section provided that no person should be excused from testifying in any prosecution under the act of 1889, or its amendments, on the ground of self-incrimination, the section granting immunity to such persons so obliged to testify. It was declared by the fourth, fifth and sixth sections of the act that in all prosecutions for a violation of the provisions of the act of 1889, or the act of 1905, a *prima facie* presumption of guilt should arise from the proof of certain facts stated in the sections in question. These sections are reproduced in the margin.* The seventh and last section of the act contained provisions concerning dealing in futures by those engaged in the business of manufacturing or wholesale merchandising, which we do not presently reproduce, as we shall hereafter consider the section.

Gatewood, plaintiff in error, was indicted for the offense of establishing and keeping an office and place of business for the purpose of carrying on or engaging in the character of business made unlawful by the first section of the act of 1905; that is, the opening and carrying on a "bucket shop." The indictment, moreover, in an additional paragraph alleged the doing of certain acts, as though it was intended to charge them as distinct offenses from the one charged in the first paragraph. The two

*SEC. 4. That in all prosecutions under said act and amendment, proof that the defendant was a party to a contract, as agent or principal to sell and deliver any article, thing or property specified or named in said act, chapter 221, Public Laws of 1889, or that he was the agent, directly or indirectly, of any party in making, furthering or effectuating the same, or that he was the agent or officer of any corporation or association, or person in making, furthering or effectuating the same, and that the article, thing or property agreed to be sold and delivered was not actually delivered, and that settlement was made or agreed to be made, upon the difference in value of said article, thing or property, shall constitute against such defendant *prima facie* evidence of guilt.

SEC. 5. That proof that anything of value agreed to be sold and delivered was not actually delivered at the time of making the agreement to sell and deliver, and that one of the parties to such an agreement deposited or secured, or agreed to deposit or secure what are commonly called "margins," shall constitute *prima facie* evidence of a contract declared void by chapter 221 of the Public Laws of 1889.

SEC. 6. That proof that any person, corporation or other association of persons, either principals or agents, shall establish an office or place where are posted or published from information received the fluctuating prices of grain, cotton, provisions, stocks, bonds and other commodities, or of any one or more of the same, shall constitute *prima facie* evidence of being guilty of violating section 1 of this act, and of chapter 221 of the Public Laws of 1889.

things thus alleged were as follows: First. That, on a date named, the accused "unlawfully and willfully did post and publish, from information received over his wires, the fluctuations in prices of grain, cotton, provisions, stocks, bonds and other commodities, contrary to the form of statute in such case made and provided," the acts so charged being those from the proof of which it was provided in the sixth section of the act of 1905 that a *prima facie* presumption of guilt would arise as to the commission of the acts forbidden by the first section of that act. Second. That, on a date named, the accused "unlawfully and willfully did take and receive from E. T. Lea an order or contract to purchase on margin 100 bales of cotton for future delivery, to wit, August delivery, at 7 56.100 per pound, and that said Lea did deposit with said defendant at said time in said county the sum of $50.00 by way of margin fluctuations in said cotton, and that settlement between said parties for said cotton was agreed to be made upon the difference in value of said cotton at said date and the date of its delivery, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State." The acts thus charged being among those from which, when proved, there would arise a *prima facie* presumption of a guilty violation of certain of the provisions of the act of 1889.

The case was tried to a jury, and, as stated in the record, after proof and hearing, a special verdict was returned. By this verdict it was separately found that the defendant had committed the several acts separately charged in the indictment; that is, in separate numbered paragraphs the jury returned that the defendant had kept an office for the unlawful dealing in futures forbidden by the first section of the act of 1905, that he had posted and published in such office the fluctuating prices of grain, etc., and, that he had made the contract for future delivery upon margin with Lea. The evidence at the trial upon which the jury acted is not in the record. The court then directed a general verdict of guilty, and judgment was entered thereon. A motion for a new trial was made, "because the act of 1905, chapter —, is in conflict with the Fourteenth Amendment, section 1, of the Constitution of the United States, to wit, the guarantee of equal protection of the laws." The new trial having been refused, and a fine of five dollars and costs having been imposed, the case was taken to the Supreme Court of North Carolina. That court affirmed the conviction. The reasoning by which the action of the court was controlled was stated as follows: "Upon the authority of *State* v. *McGinnis*, at this term, there is no error." And in the judgment of affirmance there was embodied the record and opinion in *State* v. *McGinnis*, and such record and opinion are contained in the transcript before us.

The assignments of error and the argument in support thereof involve

three general contentions, viz: the asserted repugnancy of the statute to the equal protection of the law clause of the Fourteenth Amendment, and the alleged want of power of the State to enact the statute, because its provisions not only abridge the privileges and immunities of the plaintiff in error as a citizen of the United States, but also deprive him of his property without due process of law, in violation of the same amendment. The contention that the statute denied the equal protection of the laws rests upon the terms of the seventh section, reading as follows:

"SEC. 7. That this act shall not be construed so as to apply to any person, firm, corporation, or his or their agent, engaged in the business of manufacturing or wholesale merchandising, in the purchase or sale of the necessary commodities required in the ordinary course of their business."

The alleged repugnancy of section 7, and consequently of the entire act to the equality clause of the Fourteenth Amendment, is sought to be sustained upon two grounds. First, because it is asserted that those engaged in the business of manufacturing or wholesale merchandising are permitted to commit without offense the act or acts which are made criminal by the laws of 1889 and 1905, when done by any other person; and, second, because, even if the terms of the seventh section do not effect such a result, the section nevertheless operates to produce an unlawful inequality, since it creates a *prima facie* presumption of guilt from the proof of certain acts as against all persons but those engaged in the business of manufacturing and wholesale merchandising.

It suffices to say, as to the first of these propositions, that the Supreme Court of the State, in the case upon the authority of which it placed its decision in this, expressly decided that the statute did not operate the asserted discrimination. Thus, after expressly holding that the effect of section 7 was not to relieve those engaged in manufacturing and wholesale merchandising from the operation of the provisions of section 1 of the act of 1905, prohibiting the opening and keeping of a place for gambling dealings in futures, denominated by the court a "bucket shop," the court came to consider whether the provisions of section 7 operated to relieve manufacturers or wholesale merchants from the prohibitions of the act of 1889, concerning the making of gambling contracts for future delivery. Considering this subject, the court in express terms decided that the seventh section did not have that effect, since the dealings which were prohibited by the acts of 1889 were alike prohibited as to all, including manufacturers and wholesale merchants. The court said:

"Section 7 does not confer any exclusive right or privilege upon manufacturers or wholesale merchants. It does not authorize them to engage in any business prohibited by the act of 1889. It does not authorize them to speculate in cotton or other commodities. It simply provides that the

courts shall not construe the act of 1905 to have the effect of preventing manufacturers or wholesale merchants from buying and selling for future delivery the necessary commodities required in their ordinary business.

* * * * * *

"But a purchase for actual future delivery of necessary commodities, required in the ordinary course of business and not for 'wagering' or gambling on the fluctuations of the market, would not be against the statute. The statute of this State does not prohibit all purchases or sales for future delivery, but only such dealings as are in the nature of gambling or wagering contracts. Though section 7 mentions only manufacturers and wholesale mercantile establishments as authorized to make *bona fide* dealings in 'futures,' this was done unnecessarily, we think, and only out of abundant caution. It is not a discrimination, for there is no prohibition upon any one else or any other business to buy commodities for future delivery *bona fide* in the 'ordinary course of such business,' when not for speculative or gambling purposes. That no other businesses or persons are mentioned as authorized to deal *bona fide* for the purchase of commodities on 'margin,' is not an implied restriction upon others to do an act not forbidden by any statute."

In the argument it is insisted that the construction given by the Supreme Court of North Carolina to the statute is wrong, since in effect it reads out the provisions of section 7, and it is urged that it is the duty of this court to disregard the interpretations affixed by the State court, thereby bringing the statute within the prohibitions of the Fourteenth Amendment. But it is elementary that, under the circumstances, we must follow the construction given by the State court, and test the constitutionality of the statute under that view. (*Armour Packing Co.* v. *Lacey*, 200 U. S. 226; *Smiley* v. *Kansas*, 196 Ib. 447, 455, and cases cited.)

As to the second proposition, viz., the asserted discrimination, because of inequality produced by the engendering a *prima facie* presumption of guilt from the proof of certain acts when done by persons generally, and not raising such *prima facie* presumption from the same acts when done by those engaged in manufacturing or wholesale merchandising, we think the question is not open on this record. As we have stated, the indictment distinctly charged the commission of the offense prohibited by the first section of the act of 1905, viz., the keeping a place for gambling in futures, and at the same time in a separate paragraph charged the doing of acts from which the presumption of guilt was authorized by certain sections of the act of 1905. Upon the indictment so framed a special verdict was returned, finding that the prohibited place of business had been opened and kept as charged, and that the other acts separately charged in the indictment had been committed. Now, as the evidence upon which the jury acted is not in the record, and as there is nothing in the verdict tending to show that the separate conclusion as to the commission of the act forbidden by section 1 of the statute of 1905, viz., the keeping of a place for gambling in

futures was found by the jury, because of the presumptions authorized by the statute, it cannot be affirmed that the finding of the jury as to the keeping of the place for gambling in futures was not based upon independent evidence, wholly irrespective of any presumption authorized by the act of 1905. And this conclusion becomes irresistible when it is considered that there is nothing in the record disclosing any request made to the trial court for instructions concerning the effect of the presumption created by the act of 1905, or that any express rulings on that subject were made by the court.

The contention that the judgment of conviction should be reversed, even although it does not appear that the same was based upon the presumptions authorized by the act of 1905, because of the inseparability of the alleged unequal presumptions is without merit. In *State* v. *McGinnis*, *supra*, after expressing an opinion as to the right of a State under its police power, without violating the Fourteenth Amendment, to create presumptions of guilt as to some classes of persons which would not be applicable to the same acts when done by other classes, the court said:

"But aside from what we have already said, the defendant is indicted for carrying on a 'bucket shop' business. The legislature had unquestioned power to make such business indictable. (*Booth* v. *Illinois*, 184 Ill. 425, and other cases cited, *supra*.) The facts found are that the defendant was carrying on the forbidden business. It can in no wise affect the validity of the statute making such business indictable that the purchase of commodities by others upon 'margin,' shall under certain circumstances raise a *prima facie* case that such purchases were void, and under other circumstances shall not constitute such *prima facie* evidence. A statute may be void in part and valid in part. If the provision as to *prima facie* evidence, as to certain purchases, upon 'margin,' were null, because not applying to all purchases upon 'margin,' this would in no wise invalidate that part of the statute which forbids carrying on the business of running a 'bucket shop.' The defendant is not indicted for buying commodities for future delivery upon a 'margin;' nor are manufacturers and wholesale merchants, nor any one else, exempted from the prohibition of carrying on the 'bucket shop' business. Upon the special verdict the defendant was properly adjudged guilty."

This ruling as to the separability of the statute is conclusive, and refutes the contention that the entire law is void even upon the hypothesis that the creation of presumptions as to one class not applicable to another class or classes was repugnant to the Fourteenth Amendment.

It remains only to consider the contentions that the statute upon which the conviction was had was repugnant to the due process clause of the Fourteenth Amendment, and was, moreover, void because it abridged the privileges and immunities of the plaintiff in error as a citizen of the United States. As the first rests solely upon the proposition that there was a

want of due process of law, because the State was without power to authorize a presumption of guilt on proof of the doing of certain acts specified in the statute, it is disposed of by what we have already said. And as the second was not pressed in argument, and is not shown by the record to have been raised or even suggested in the court below, we need not further consider it.

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.